

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ELLEN JANE KUTTEN, individually and on behalf of her daughters and))))	
MARY ANN ARNOLD and ELSIE MAHLER SCHARFF,))))	Case No. 4:04-CV-244 CAS
on behalf of themselves and all others similarly situated,))))	
Plaintiffs,)	
v.)	
BANK OF AMERICA, N.A. and BANK OF AMERICA CORPORATION,))))	
Defendants.)	

**BANK OF AMERICA, N.A. AND BANK OF AMERICA CORPORATION'S MOTION
TO DISMISS PLAINTIFFS' CLASS CLAIMS AND THE INDIVIDUAL CLAIMS OF
PLAINTIFF KUTTEN FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants Bank of America, N.A. ("Bank") and Bank of America Corporation ("BAC") (collectively "Defendants"), in support of their motion to dismiss Plaintiffs' class claims and the individual claims of Plaintiff Kutten for lack of subject matter jurisdiction, state as follows:

1. This is a putative class action against Defendants alleging breaches of purported contractual and fiduciary duties with respect to certain investments in the Plaintiffs' trust accounts. As set forth in Defendants' Memorandum in Support, Plaintiffs' class claims and the individual claims of Plaintiff Kutten should be dismissed on various grounds.

2. First, no individual Plaintiff has compensatory damages which exceed \$75,000. Both Plaintiff Arnold and Scharff, as the putative class representatives, fail to meet the amount in controversy requirement under 28 U.S.C. § 1332(a) and therefore, this Court lacks diversity jurisdiction over any of the class claims. Likewise, Plaintiff Kutten's individual claims do not

exceed \$75,000 and should be dismissed. Plaintiffs cannot establish by a preponderance of the evidence that the amount in controversy meets the jurisdictional amount. Thus, pursuant to Federal Rule of Civil Procedure 12(b)(1) the claims should be dismissed because this Court lacks subject matter jurisdiction.

3. Second, Plaintiffs' request for punitive damages also falls short of the jurisdictional minimum because Plaintiffs' fail to sufficiently allege facts under either California or Missouri law to entitle them to such relief. As such, their request for this relief does not contribute to the amount in controversy necessary to invoke federal jurisdiction.

4. Finally, Plaintiffs either lack standing to assert claims for injunctive relief, or, the injunctive relief requested is not recoverable or has no value. Thus, Plaintiffs cannot rely on this relief to reach the jurisdictional minimum.

5. A supporting memorandum of law and proposed order accompany this motion.

WHEREFORE, for the reasons set forth above and in the accompanying memorandum of law, Bank of America, N.A. and Bank of America Corporation request that their Motion to Dismiss be granted and the Second Amended Complaint be dismissed.

DATED: January 30, 2006

By BRYAN CAVE LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 30th day of January, 2006 upon the following counsel of record by the manner indicated below:

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January 30, 2006